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IN THE

Supreme Court of the United States

October Term, 1944

No. 945

JAMES NEGRO,

Petitioner,

v.

BOSTON AND MAINE RAILROAD,

Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT OF PETITION

IRVING I. GOLDSMITH,
Of Counsel.

Saratoga Printing Company, Saratoga Springs, N. Y.

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BOSTON AND MAINE RAILROAD,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, James Negro, respectfully prays that a writ of certiorari be issued from the Supreme Court of the United States directed to the Supreme Court of the State of New York, commanding that Court to certify for review and determination a transcript of the record and all proceedings in the case entitled James Negro, plaintiff-appellant, against Boston and Maine Railroad, defendant-respondent, and that the order of the Court of Appeals affirming the order of the Appellate Division, Third Department, and the judgment entered thereon may be reversed, and that the judgment of the

Trial Court be reinstated, and that the petitioner may have such other and further relief as may be just and proper.

Statement of the Case.

This action was brought by plaintiff in the Supreme Court of the State of New York under the Federal Employers' Liability Act (Title 45, U.S.C.A., Secs. 51 et seq.) to recover damages for personal injuries sustained by plaintiff, while in the employ of defendant, by reason of the negligence of defendant.

The action was commenced September 16, 1943 (R-1).

The complaint alleges in substance that on the 1st day of July, 1943, while plaintiff was engaged in the performance of his duties as freight handler or trucker at the Mechanicville, N. Y., freight transfer dock of the defendant, he was caused to slip and fall on the dock platform in such a manner that a heavy truck which plaintiff was pushing fell on plaintiff, whereby plaintiff sustained multiple comminuted fractures of the right tibia, and that such fall and injuries were caused solely by reason of the negligence of the defendant (R-4-6).

The answer is a general denial of negligence on part of the defendant and alleges contributory negligence on part of plaintiff (R-7).

The case was tried in Supreme Court, Saratoga County, New York, before Mr. Justice Lawrence and a jury, at the January 1944, term, and resulted in a verdict in favor of plaintiff for the sum of Five Thousand Dollars, and judgment for that amount, with Seventy-two Dollars and fifty cents costs was entered in the Saratoga County Clerk's Office on January 31, 1944 (R-19).

Defendant appealed to the Appellate Division of the Supreme Court, Third Department (R-2), which court, two Justices dissenting, reversed the judgment of the trial court and dismissed the complaint (R-161-163).

Plaintiff thereafter appealed to the Court of Appeals of the State of New York, which court affirmed the decision of

the Appellate Division by a divided Court, without opinion, Justices Loughran and Conway dissenting.

Opinions Below.

The majority opinion of the Appellate Division, Third Department (R-165-169), and the dissenting opinion of the same Court (R-170), are reported 286 App. Div. 59. There was no opinion in the Court of Appeals. The case is officially reported in 293 N. Y., 791 (Weekly Advance Sheets No. 301, February 3, 1945).

Jurisdiction.

The decision of the Court of Appeals of the State of New York was made on the 16th day of November, 1944, and judgment entered thereon on the 18th day of November, 1944. That said judgment is a final judgment rendered in this action by the highest court of the State of New York, in which a decision in this suit could be had. The jurisdiction of the Supreme Court is invoked under Section 237 of the Judicial Code as amended (U. S. C. A. Title 28, Sec. 344).

Statute Involved.

The federal statute directly involved is the Federal Employers' Liability Act (U.S.C.A. Title 45, Secs. 51, et seq.)

Section 51 provides in part as follows:

> "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce * * * resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

Summary Statement of Facts.

Defendant maintains at or near the City of Mechanicville, New York, a freight transfer terminal where freight in transit between various points in the United States and elsewhere is transferred from one train to another. It consists briefly of two platforms each about 800 feet long (R-73) running parallel to each other and separated by a single railroad track (R-74) and having numerous railroad tracks on each side of and running parallel to the platforms (R-74). Freight cars are lined up on these tracks and small bridges are placed between the platforms and the cars and between the cars (R-42, 43). Freight is moved from the various cars to the platforms and thence to other cars. This is done by means of two-wheeled hand trucks. (See exhibits, R-152 and 154). About sixty to eighty men are usually employed in this operation (R-80).

The men move their trucks in various directions up and down and across the platforms (R-82).

Near the outer edge of each platform and running the full length thereof is a set of steel plates known as "runways." These plates are ten inches wide and are placed about eleven inchs apart and are about fifteen inches from the outer edge of th platforms (R-74-75). The platforms are fifteen feet, five inches wide (R-74) and are divided lengthwise by a line of posts which support the roof. (Exhibits 1 and 2, R-148, 150).

The runways are provided to facilitate the movement of trucks up and down the platforms. They were smooth and slippery, had been in constant use for over fifteen years, and no abrasive substance had ever been applied to them (R-88). These facts were not disputed.

On the day of the accident, plaintiff was engaged in his duty of conveying freight from one car to another. He was pushing his truck along the runways on one of the platforms. On his left and about fifteen inches away was a line of freight cars. On his right and about three or four feet away was the line of posts which support the roof. There were about eigh-

teen cars lined up along the platform and the doors of all of them were open.

As plaintiff pushed his truck along, suddenly and without warning, an other employee pushed a truck containing a large crate out of a car door directly into plaintiff's path. Plaintiff in attempting to avoid a collision, slipped on the steel runways and fell. The truck fell on his leg causing the injury complained of (R-46). Plaintiff's version of the accident, while disputed on the trial, was conceded as true in both appellate courts below.

Plaintiff contends defendant was negligent in failing to provide a safe place to work in that the platform was too narrow to provide ample room for the movement of a large number of men and trucks, that the steel plates upon which plaintiff was required to step were slippery and dangerous, that no rules were provided for the safe movement of men and trucks, and that no guards, warnings or other means were provided to protect plaintiff against trucks coming suddenly out of car doors.

Plaintiff also contends that the act of the employee in pushing a loaded truck out of a car door directly into plaintiff's path without taking any means or precaution to see if the way were clear and in violation of a rule that loaded trucks should be pulled out of cars and not pushed, whereby plaintiff was injured, was a negligent act for which the defendant was responsible.

The jury decided on the evidence presented that the defendant was negligent. Plaintiff contends that there is ample proof to sustain the verdict of the jury.

The Appellate Division, by a divided vote, reversed the judgment of the trial court on the ground that the defendant assumed the risks of his employment (R-165-169).

Plaintiff contends this ruling is erroneous and contrary to the statute (U.S.C.A., Sec. 54), and contrary to the decisions of the Supreme Court.

On plaintiff's appeal to the Court of Appeals of the State of

New York, the judgment of the Appellate Division was affirmed, by a divided court, without opinion, on the ground that there was no proof of any negligence causing the injury.

Question Presented.

Was there sufficient evidence of negligence to sustain the verdict of the jury?

Reasons Relied on for Allowance of Writ.

1. There was ample proof of the defendant's negligence causing the injury.
2. Plaintiff has in effect been deprived of a right to trial by jury which is part and parcel of the remedy provided by the Federal Employers' Liability Act.
3. That the decision of the State Courts is in conflict with the Federal Statute and the decisions of the Federal Courts.
4. That the decision of the State Courts has abolished the authority of the Federal Employers' Liability Act in the State of New York.
5. That the decision of the Court of Appeals, in affirming without opinion, the decision of the Appellate Division creates confusion as to the existence of the so-called "doctrine of assumption of risk."

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari be granted in this case to the Supreme Court of the State of New York and cause the records in this case to be brought to this Court for final review and determination.

Dated February 7, 1945.

JAMES NEGRO, *Petitioner*,
by IRVING I. GOLDSMITH,
Counsel for Petitioner,
398 Broadway,
Saratoga Springs, N. Y.

BRIEF SUPPORTING PETITION

I.

THE DEFENDANT WAS NEGLIGENT

The place in which plaintiff was required to work was dangerous. The platform, fifteen feet in width, was divided by a line of posts up and down the center, leaving a space about seven feet wide in which the men were required to push their trucks (R-75). The trucks were over two feet in width (R-83). The runways on which the trucks were supposed to be wheeled were about fifteen inches from the sides of the cars (R-74). There were eighteen cars along the platform, with the doors open, and men were continually wheeling trucks, loaded and unloaded, in and out of these doors. There were no rules regulating these movements except one rule which provided that loaded trucks should be pulled out of cars and not pushed (R-89). There were sixty to eighty men engaged in this operation (R-80, 89). The steel runways were smooth and slippery from fifteen years of constant use (R-88). This was not disputed. There were no guard rails or guards protecting the doorways (R-88). No signal, warning, or other means was provided to indicate when a truck was to be brought out of a car, except the rule that loaded trucks should be pulled out and not pushed (R-89).

With such an arrangement as this, little argument, if any, is required to demonstrate the dangerous condition which existed. As a man pushed his truck along the runways, only fifteen inches from the sides of the cars, he was confronted about every forty or fifty feet with an open door out of which at any moment a heavy, loaded truck might be pushed directly into him, or so close to him that he might be injured, as was plaintiff. It would be impossible for a man walking along so close to the sides of the cars to see into the car before he reached the doorway. Likewise, it would be impossible for a man coming out of a car with a truck to see if the platform were clear until he reached the edge of the car. The danger of

this situation was apparently recognized by defendant. Hence the rule that trucks should be pulled out of cars instead of pushed out. But this rule was not enforced, which constitutes negligence. Furthermore, if the defendant realized, as it did, that there was danger created by the movement of trucks out of cars under the conditions which it created and maintained, the defendant then was negligent in not providing guards or warnings as well as a rule which it failed to enforce.

Furthermore, the runways, as far as appears, could have been placed on the inner side of the platform near the posts and away from the sides of the cars. This would place the men on the runways four or five feet away from the doors with a much better chance to see into the cars and to be seen from the cars.

The runways themselves were smooth and slippery, thus creating an additional hazard. No attempt was ever made by defendant to remedy this condition by the use of paint, abrasives or other means to eliminate the slippery condition. Yet the defendant knew that the men, going in all directions, up and down and across, and turning in and out for one another, would be obliged to step on the slippery steel; and in pushing heavy loads, even an empty truck weighs 125 pounds, firm footing is a necessity.

There were sixty to eighty men pushing trucks loaded with all manner of objects, some of great size and weight, in all directions, with no rules to guide their movements. The confusion and danger is easy to perceive.

The act of the employee who pushed the truck with the large crate suddenly and without warning into plaintiff's path was certainly a negligent act. In so doing, he violated the rule of the defendant. The crate was so large he could not see ahead (R-129) and he failed to look. If he had been pulling the truck as required, he could have seen plaintiff in time to stop. His act was in utter disregard of plaintiff's safety.

The jury was justified in considering all of these circumstances in weighing the negligence of the defendant.

Bailey v. Central Vermont Ry., 319 U. S. 350.
Bimberg v. Northern Pac. R. R., 14 N. W. 2nd, 410.
Ross v. Louisville & N. R. Co., 172 So. 752.
McGivern v. Northern Pac. R. R., 132 F. 2nd, 213.
Tennant v. Peoria & P. U. Ry. Co., 321 U. S. 29.
Owens v. Union Pac. R. Co., 319 U. S. 715.

II.

PLAINTIFF HAS, IN EFFECT, BEEN DEPRIVED OF A JURY TRIAL.

The appellate courts of New York had no right to substitute their judgment on the facts in place of the judgment of the jury. It is the province of the jury to determine the facts as to whether or not the defendant was negligent.

> "The debatable quality of that issue, the fact that fair-minded men might reach different conclusions, emphasize the appropriateness of leaving the question to the jury. The jury is the tribunal under our legal system to decide that type of issue."
> Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54.
> Bailey v. Central Vermont, supra.

> "The right to trial by jury is a basic and fundamental feature of our system of federal jurisprudence (Jacob v. New York City, 315 U. S. 752). It is part and parcel of the remedy afforded railroad workers under the Employers' Liability Act."
> Bailey v. Central Vermont, supra.

> "It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, receives expert instructions, and draws the ultimate conclusions as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. (Washington & Georgetown R. Co. v. McDade, 135 U. S. 554; Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54; Bailey v. Central Vermont Ry., 319 U. S. 350). That conclusion whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not

> free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions, or because judges feel that other results are more reasonable.
>
> Tennant v. Peoria, &c. Ry. Co., 321 U. S. 29.

Thus the Court of Appeals of the State of New York, in holding that there was no proof of negligence after a jury had decided that there was such proof, has deprived plaintiff of the rights, privileges and remedy afforded him under the Federal Act. If the Court of Appeals has such power, then litigants in the State of New York under the Federal Employers' Liability Act are not receiving rights and remedies accorded to such litigants in the Federal Courts and in other states.

In a recent case this Court said:

> "There is thus presented the problem of whether sufficient evidence of negligence is furnished by the record to justify the submission of the case to the jury. In Employers' Liability cases, this question must be determined by this Court finally. Through the supremacy clause of the Constitution, Art. VI, we are charged with assuring the Act's authority in state courts. Only by a uniform federal rule as to the necessary amount of evidence may litigants under the federal act receive similar treatment in all states."
>
> Brady v. Southern R. R., 320 U. S. 476.

III.

THE DECISION OF THE NEW YORK STATE APPELLATE COURTS IS IN CONFLICT WITH THE FEDERAL STATUTE AND DECISIONS OF THE FEDERAL COURTS, AND HAS ABOLISHED THE AUTHORITY OF THE FEDERAL ACT IN THE STATE OF NEW YORK.

Under this point we believe it will suffice to refer to the statute involved and the recent decisions thereunder.

U. S. C. A., Title 45, Secs. 51-54.

Tiller v. Atlantic Coast Line Ry., supra.
Bailey v. Central Vermont Ry., supra.
Brady v. Southern R. R., supra.

IV.

THE DECISION OF THE COURT OF APPEALS OF THE STATE OF NEW YORK, WHEREIN IT AFFIRMS, WITHOUT OPINION, THE DECISION OF THE APPELLATE DIVISION, CREATES CONFUSION AS TO THE PRESENT STATUS OF THE LAW REGARDING THE SO-CALLED DOCTRINE OF ASSUMPTION OF RISK.

Assumption of risk as a defense was abolished by Congress by the 1939 amendment.

U.S.C.A. Title 45, Sec. 54.
Tiller v. Atlantic Coast Line, supra.

The majority opinion of the Appellate Division (R-165), reported in 268 App. Div. 59, completely ignores the statute and the subsequent decision of this Court in the Tiller case as well as the decisions of other federal courts following the Tiller case. This decision having been affirmed by the Court of Appeals without opinion and by a divided court with the simple statement that there was no proof of negligence leaves the status of the law on this question in the State of New York confusing and doubtful.

The said decision in effect affords railroads operating within the State of New York a defense to actions brought under the Federal Employers' Liability Act which railroads operating in other states do not have.

Conclusion

FOR THE FOREGOING REASONS STATED IN THE PETITION AND BRIEF HEREIN, IT IS RESPECTFULLY SUBMITTED THAT THE PETITION FOR A WRIT OF CERTIORARI IN THE INSTANT CASE SHOULD BE GRANTED.

Dated February 7, 1945.

IRVING I. GOLDSMITH,
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Saratoga Springs, N. Y.

(20)

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Supreme Court of the United States

October Term, 1944.

No. 945.

JAMES NEGRO,

Petitioner,

vs.

BOSTON AND MAINE RAILROAD,

Respondent.

BRIEF OPPOSING WRIT OF CERTIORARI.

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THE REPORTER COMPANY, Inc., Walton, N. Y.
1945

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Supreme Court of the United States

OCTOBER TERM, 1944.

No. 945.

JAMES NEGRO,
Petitioner,
vs.
BOSTON AND MAINE RAILROAD,
Respondent.

BRIEF OPPOSING WRIT OF CERTIORARI.

Statement of Facts.

Although there was no conflict in the evidence, some facts, in addition to those contained in the petition for certiorari, should be stated.

The surface of the platform, 15 feet 5 inches in width (R. 74) and about 800 feet in length (R. 73) with a roof supported by a line of 50 posts in the center (R. 76, 79), was originally macadam (R. 72). Due to the softening of this material in hot weather, permitting wheels of the hand-trucks to sink in, a wood plank flooring was laid in 1929 (R. 72). In order to make the loaded hand-trucks run easier (R. 73), 2 steel strips each 10 inches in width (R. 74) and about 11 inches apart (R. 75) were fastened to the plank flooring with counter-sunk screws (R. 76). They extended lengthwise over the platform, the one on the outside being 15 1/2 inches from the outer edge of the platform (R. 74) and the one on the inside 3 feet 3 inches from the line of posts (R. 75). The distance from the outer edge of the platform to the post line was 7 feet 2 inches (R. 75) and the total width of the platform 15 feet 5 inches (R. 74) (Photos. R. 148,

150). The hand-trucks (Photos. R. 152, 154) are about 5 feet in length (R. 84) and about 20 to 24 inches in width (R. 83), permitting one wheel to run on each strip and the employee to walk on the wood flooring between. This facilitated the handling of loaded trucks and made them run easier (R. 73).

There are no rules or regulations where the men are to move with these hand-trucks (R. 82) and they go in all directions (R. 82, 43, 66), sometimes on one side of the platform and sometimes on the other, turning in and out as the occasion requires (R. 81). Usually a man with an empty truck will turn out of the way of a loaded truck (R. 63). When a loaded truck is being moved *along* the platform, it is supposed to be pulled instead of pushed (R. 89), but when loaded trucks are being brought out of a car they are sometimes pushed out and at other times pulled, depending upon the kind of load, how it is placed in the car (R. 95, 98), whether it is necessary to make a turn and how other material and freight may be placed in the car (R. 111).

Petitioner had been employed as a freight handler since some time in May, 1943 (R. 59). On July 1st he started work at 7:00 A. M. with other employees and had moved some freight from one car to another (R. 59). About a half hour after the day's work started (R. 59) he was on his way back for another load, pushing his *empty* truck (R. 45) along the left side of the platform (R. 61). About 2 or 3 feet to his left (R. 58) stood a line of freight cars along the platform, each with an open door, and to his right was the line of posts in the center of the platform (R. 61).

He was walking on one of the steel runways (R. 60), not on the planking in the space between them, when suddenly a loaded truck came out of one of the cars on

his left about 7 or 8 feet in front of him (R. 58). He stopped to avoid a collision, his feet slipped on the steel runway, he fell backward and his truck fell upon him, breaking his right leg (R. 45-46, 62).

I.

The Court of Appeals, in affirming the judgment dismissing the complaint "on the ground that there was no proof of any negligence causing the injury" (R. 172) (293 N. Y. 791), correctly decided the case.

1. *In so doing it has followed the rule recently reiterated by this Court.*

> "When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims."
>
> *Brady v. Southern Ry. Co.*, 320 U. S. 476, 479-480.

2. *There was no proof to sustain a finding of negligence.*

a. *Size of platform.*

Its width had nothing to do with the accident. Ample space was provided for petitioner to choose where to walk with his empty truck. That 80 men worked there daily, moving their trucks in various directions, is sufficient refutation of such contention, if any is needed.

b. *The steel runways.*

Existing in the same location for nearly 15 years (R. 72-73) and installed for the purpose of making loaded trucks run easier (R. 73), they were not defective. Naturally they were smooth (R. 45, 88), for the very purpose of their installation required it. If, as petitioner testified, he was walking upon one of the steel strips (R. 60-61), and he must have been to have slipped on it, the wheels of his truck would have been astride the strip, whereas they were intended for the wheels to run on. Sufficient space existed between the strips upon which to walk (R. 75). The Trial Court, without objection of petitioner, charged that no negligence could be based upon the installation and maintenance of the steel runways (R. 145).

The measure of the employer's duty was reasonable care only and not that of an insurer.

Tiller v. Atlantic Coast Line R. R., 318 U. S. 54, 67.
Missouri Pacific Railroad Co. v. Aeby, 275 U. S. 426.
Delaware, &c., R. R. v. Koske, 279 U. S. 7.

Eighty men working 300 days a year for 15 years at this location would account for 360,000 man-days, which multiplied by the number of times each moved to-and-fro daily along this platform, gives some indication of its extensive use and reasonable safety.

c. *"Traffic" rules.*

The work was not of a complicated nature and was such that the men were required to move in various directions and look out for themselves. The work was free from complexities and simple in character. No rules are required to direct such commonplace work.

McGivern v. Northern Pacific Ry., 132 Fed. 2d 213, 219.

d. *There was no negligence of any fellow employee.*

Failure to look, if there was such, did not cause the accident. It would be highly unreasonable to require an employee, before bringing a loaded truck out of a car door, to go to the door and look up and down the platform to see if anyone was approaching. By the time he had done so and returned for his load many employees might approach in different directions. Looking, under such circumstances, would have been to no avail. Nor would a signal or warning. With 18 freight cars along each side (R. 75), a signal each time one of the 80 employees emerged from a car with a loaded truck would only have resulted in utter confusion.

There was no collision. Petitioner was subjected to no more danger than he would have been had another employee walked out of the car in front of him, instead of a loaded truck suddenly appearing. He was endeavoring to avoid walking into an object (R. 62), the nature of which was entirely immaterial.

Nor was there violation of any rule. The supposed rule applied only to the movement of a loaded truck *along* the platform (R. 98). When, however, loaded trucks are brought out of a car they are pushed at times and at other times pulled, depending upon the kind of load, how it is placed in the car (R. 95, 98), whether it is necessary to make a turn and how other freight may be placed in the car (R. 111). Hence, such rule did not apply to a truck coming out of a car onto the platform (R. 96, 98, 110-111). "They come out of the car both ways" (R. 98). There would have been the same necessity to stop whether the truck or the man first emerged

from the door. This accident was caused solely by the fortuitous circumstance that petitioner, while walking on one of the steel strips, came to a sudden halt causing his feet to go out from under him, and not by reason of any negligence on the part of the respondent.

II.

No substantial federal question is presented.

1. Affirmance by the Court of Appeals without opinion does not signify anything beyond approval of the result in the court below.

> *Rogers v. Decker*, 131 N. Y. 490, 493.
> *People ex rel. Palmer v. Travis*, 223 N. Y. 150, 156.
> *Matter of Clark*, 275 N. Y. 1, 4.

2. Moreover, its decision does not purport to rest upon assumption of risk but "on the ground that there was no proof of any negligence causing the injury" (R. 172). The fact that the intermediate Appellate Court discussed assumption of risk in its opinion is comparable to the situation in *Beamer v. Virginia Ry.*, 181 Va. 650; 26 S. E. 2nd 43, where the Trial Court dismissed the complaint because of assumption of risk in a case arising since the 1939 Amendment, but the highest Court of Virginia affirmed upon the basis of no negligence and this Court denied certiorari (321 U. S. 763).

3. No construction or interpretation of the Federal Employers' Liability Act is involved, but merely the question presented in any negligence action, of whether there is any proof to submit to a jury. Such a case, involving no matter of public importance, no question of statutory or constitutional interpretation, no conflict with any other decision of this or any other Court, no important question of law, does not justify a review by this Court. Petitioner has been afforded a hearing in three State Courts. To

grant a fourth under the circumstances here involved is unwarranted.

Bailey v. Central Vermont Ry., 319 U. S. 350, 354, *et seq.*

4. There is no conflict with any decision of this Court. The Court of Appeals has followed the long standing rule of this and all other Courts, that before a case can be submitted to a jury there is always the preliminary question for the Court whether, viewing the facts most favorably to the plaintiff, a recovery is justified.

Coughran v. Bigelow, 164 U. S. 301, 307.
Penna. R. R. v. Chamberlain, 288 U. S. 333, 343.
Brady v. So. Ry. Co., 320 U. S. 476, 479-480.

5. To follow that rule, as the Court of Appeals has done here, does not deprive petitioner of a jury trial, because a jury trial connotes trial before the Court as well as the jury. Any other rule would constitute abdication of the function of the judge and make him a mere umpire, powerless to prevent "the mischance of speculation over legally unfounded claims" (*Brady v. So. Ry. Co., supra*, 320 U. S. 476, 480).

III.

The petition should be denied.

All of which is respectfully submitted.

Dated: March 1, 1945.

CHARLES E. NICHOLS,
Counsel for Respondent,
75 State Street,
Albany, New York.